# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

## DIVISION II

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| STATE OF WASHINGTON,<br><br>Respondent,<br><br>v.<br><br>GARY ALEXANDER MARSHALL,<br><br>Appellant. | No. 33007-5-II<br><br><br><br><br><br>UNPUBLISHED OPINION |

VAN DEREN, J. — Gary Marshall appeals the trial court's decision to revoke his Special Sex Offender Sentencing Alternative (SSOSA), arguing that (1) he was denied his right to confrontation at the revocation hearing; (2) the court erroneously admitted his polygraph results at the hearing; (3) the court used an erroneous standard of review; and (4) he received ineffective assistance of counsel when his attorney failed to object to the admission of the polygraph results.

Finding no error, we affirm.

FACTS

A. Legal History

In March 2004, Marshall pleaded guilty to first degree child rape and first degree child molestation. As part of his plea agreement, the State agreed to recommend a SSOSA, which the court granted, sentencing Marshall to 131 months for first degree child rape and 89 months for

first degree child molestation. The court suspended all but six months of the sentence for sex offender treatment.

The court ordered Marshall to successfully complete three years of outpatient sex offender treatment under the care of certified sex offender treatment providers, Macy's and Associates. Further, the court required Marshall to abide by the conditions set by his community corrections officer (CCO) and by Macy's.

In December 2004, the court received notice that Marshall violated the terms of his SSOSA. Gabe Stajduhar, Marshall's CCO, informed the court that Marshall had been terminated from Macy's treatment program, had contact with a minor, failed to report a romantic relationship, and failed to take a required polygraph examination.

B. Substantive Facts of Violation

The revocation proceeding stemmed from Marshall's contact with T.D., a 15-year-old girl, over a three-month period and a sexual relationship between Marshall and Rochelle Craig, who had two minor children.

On December 2, 2004, a concerned citizen called the Pierce County Sheriff's office to report that a possible sex offender named Gary frequently visited a house where a minor lived. The informant told the sheriff's office that the offender told the minor to lie to any law enforcement officer if they questioned her.

The sheriff's office referred the call to CCOs Daina Ager and Polly Holton. Holton and Ager went to the reported minor's home with a photomontage that included a picture of Marshall. When no one answered the door, they went to the next door neighbor's house belonging to Andy

and Anita Chamsvas. The Chamsvases told Ager and Holton that the neighboring house belonged to Autumn Daulton. They said that Autumn lived in the home with her mother, Emma Daulton,[1] and Autumn's 15-year-old daughter, T.D.. The Chamsvases identified Marshall from the photomontage and said that he frequented the house on a regular basis.

Ager and Holton then contacted Stajduhar, who informed Marshall's treatment provider Bob Macy about Marshall's contact with a 15-year-old girl. Macy and Stajduhar took Marshall into custody when Marshall arrived at Macy's office. In custody, Marshall admitted to having been alone with T.D. up to five times. He denied any inappropriate behavior with T.D. and said that they had just talked, but he admitted to being at T.D.'s home once or twice a week for the past three months. He also admitted that he told her to lie to law enforcement if they questioned her.

Autumn also spoke with Stajduhar. She said that Marshall had contact with T.D. but that they were never alone. She stated that Marshall and Emma were friends and that Marshall came to the house to visit Emma, who was disabled and lonely. Autumn did not have a problem with Marshall's contact with T.D.

Stajduhar also contacted Marshall's roommate, who told Stajduhar that Marshall had a girlfriend, Rochelle Craig. One of Marshall's SSOSA conditions was that he report any romantic relationships to his CCO. When Stajduhar contacted Craig, she stated that she knew Marshall but that she was not his girlfriend. She admitted that she had children, but she denied that Marshall

[1] Andy Chamsvas is Autumn Daulton's father. His wife is Autumn's step-mother. Emma Daulton is Autumn's mother. For clarity, we refer to Autumn and Emma by their first names. We mean no disrespect.

ever had contact with them.

Stajduhar again interviewed Marshall, who admitted to twice having sex with Craig and to knowing that she had children. But he stated that when he was at Craig's home, the children were upstairs and he was downstairs and the only time he saw them was when they came downstairs to use the bathroom. He denied any physical contact with the children. He said that he did not report his contact with Craig because he did not consider it to be a romantic relationship.

Macy's informed the trial court that it was no longer willing to accept treatment responsibility for Marshall. It based its decision on (1) Marshall's contact with T.D. (which it learned from the Department of Corrections); (2) his pattern of deceptive and manipulative behavior; and (3) his less than satisfactory performance in treatment homework.[2]

Stajduhar ordered Marshall to submit to a polygraph test but Marshall refused on his attorney's advice. This refusal violated the terms of his SSOSA. Marshall subsequently took a polygraph test, which he failed.

C. Revocation Hearing

Stajduhar testified at the revocation hearing about the contents of his report, which included (1) the concerned citizen call and the subsequent interview Ager and Holton conducted with the neighbors; (2) his conversation with Autumn; (3) the interviews with Marshall's roommate and Craig; and (4) several conversations he had with Marshall in which Marshall did not disclose contact with T.D. or his relationship with Craig. Additionally, Stajduhar testified that Marshall failed the polygraph examination. Stajduhar recommended revoking Marshall's

[2] At the revocation hearing, Bob Macy testified that the primary reason he terminated Marshall's treatment was because of the contact with T.D.

SSOSA. Marshall did not object to Stajduhar's testimony.

Emma testified that Marshall told her that he could not have contact with T.D. and that they therefore took steps to ensure that T.D. was not home when Marshall visited. T.D. testified that she met Marshall in person at least once, but she said that they never conversed. She said that she would leave if he came to the house.

The State admitted Marshall's polygraph results into evidence. The report indicated deception on the following questions:

> 1) Have you been alone in a vehicle or residence with a minor since your last polygraph examination in July 2004?
> 2) Have you had any physical contact with a minor since your last polygraph examination in July 2004?
> 3) Have you been alone with [T.D.] since your last examination in July 2004?
> 4) Have you engaged in sexual contact with a minor since your last polygraph examination in July 2004?

Exhibit 7. The polygraph examiner did not testify and Marshall did not object to the polygraph test's admission.

In its decision to revoke Marshall's SSOSA, the court reminded Marshall that a SSOSA sentence was a privilege that required total compliance. It concluded that "in this case the polygraph becomes of extreme importance." Report of Proceedings (RP) at 195. It found that Marshall was not credible and based this conclusion about his credibility on the polygraph results.

The court revoked Marshall's SSOSA and reinstated the remainder of his 131-month sentence.

## ANALYSIS

A. Standard of Review

A trial court may impose a SSOSA sentence, which suspends the sentence for a first time sex offender, if the offender is proven to be amenable to treatment. RCW 9.94A.670(3); *State v. Dahl*, 139 Wn.2d 678, 682, 990 P.2d 396 (1999). Under a SSOSA, the offender is released into community custody and receives up to three years of inpatient or outpatient sexual deviancy treatment. *Dahl*, 139 Wn.2d at 683. The court may revoke a SSOSA at any time if it reasonably believes that an offender has violated a condition of his sentence or has failed to make progress in treatment. RCW 9.94A.670(10); *State v. Canfield*, 120 Wn. App. 729, 732, 86 P.3d 806 (2004). We will not disturb the revocation of a suspended sentence absent an abuse of discretion. *State v. Badger*, 64 Wn. App. 904, 908, 827 P.2d 318 (1992).

Revocation hearings are not criminal proceedings and the offender is not afforded the same due process rights as those afforded at trial. *Dahl*, 139 Wn.2d at 683.

B. Admitted Hearsay Evidence

Marshall argues that the court violated his right to confront when it admitted hearsay statements and failed to show good cause for admitting those statements.

1. *Crawford v. Washington*[3]

Marshall argues that the court relied on unreliable hearsay testimony to revoke his SSOSA and thus, under *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), his Sixth Amendment right to confrontation was violated.

In *Crawford*, the United States Supreme Court ruled that the confrontation clause bars the

[3] 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

admission of testimonial hearsay statements made by a non-testifying witness unless the hearsay declarant is unavailable and the defendant had prior opportunity to cross-examine the declarant. 541 U.S. at 68.

In *State v. Abd-Rahmaan*, our Supreme Court addressed the applicability of *Crawford* to SSOSA revocation hearings and held that *Crawford* does not apply to sentence modification hearings because the "minimal *due process right* to confront and cross-examine witnesses is not absolute." 154 Wn.2d 280, 289, 111 P.3d 1157 (2005) (quoting *Dahl*, 139 Wn.2d at 686). The court observed that *Morrissey v. Brewer*[4] established Fourteenth Amendment rights to due process in parole revocation hearings, but it did not guarantee the Sixth Amendment right of confrontation in such hearings. *Abd-Rahmaan*, 154 Wn.2d at 288.

Thus, *Crawford* does not apply to SSOSA revocation hearings and the trial court did not err when it admitted hearsay statements at Marshall's hearing.

2. Good Cause

Even though *Crawford* does not require that the opportunity to confront witnesses be guaranteed in a revocation hearing, Marshall was still entitled to minimal due process and entitled to confrontation unless there was good cause to forgo live testimony. *Abd-Rahmann*, 154 Wn.2d 290; *Dahl*, 139 Wn.2d at 686. Good cause is "defined in terms of the difficulty and expense of procuring witnesses in combination with 'demonstrably reliable' or 'clearly reliable' evidence." *Abd-Rahmaan*, 154 Wn.2d at 290 (quoting *State v. Nelson*, 103 Wn.2d 760, 765, 697 P.2d 579 (1985)).

[4] 408 U.S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972).

The trial court need not make written findings of fact for a showing of good cause, but it must provide some record explaining the evidence on which it relied and its reasons for admitting hearsay testimony in a revocation hearing. *Abd-Rahmaan*, 154 Wn.2d at 290. The record must persuade us that the evidence was either demonstrably reliable or that there was some difficulty or cost to procure live witnesses. *See, e.g., Abd-Rahmaan*, 154 Wn.2d at 290.

Evidence may be deemed reliable if it is corroborated by the defendant or other witnesses at the hearing. *See, e.g., Nelson*, 103 Wn.2d at 765.

Marshall argues that Macy testified that he terminated Marshall's treatment because Marshall had contact with a minor. Marshall argues on appeal that Macy had no firsthand knowledge of the contact and thus could not testify to it. Macy was, however, present at Marshall's arrest and heard Marshall admit to contact with T.D. Further, Marshall corroborated the information when he testified that he had contact with T.D. Thus, Macy's statements are demonstrably reliable and the court did not err when it considered them.

Next, Marshall argues that Stajduhar based his testimony solely on information provided by the Chamsveses and Autumn, rather than on information of which Stajduhar had first had knowledge. Stajduhar testified that Autumn and the Chamsveses told him that Marshall frequented the Daulton home. Marshall confirmed this fact in his testimony, demonstrating the reliability of Stajduhar's testimony.

Furthermore, although Marshall attempted to explain why he violated the terms of his SSOSA, he did not deny the violations. For example, he admitted that on at least one occasion he saw Craig's children when they came downstairs. He said he did not report it because he did not

think it was important because he had not touched them nor spoken to them. And in his closing argument, he stated:

> The first allegation was that he was terminated from Macy's, and he obviously admits that with explanation.
>
> Having regular minor contact since July of 2004 in Pierce County. And because of the use of the word "regular," he would deny that.
>
> Failing to report a romantic relationship in order to verify that there was no victim-aged children involved. He would admit with explanation.
>
> And failure to submit to the polygraph, he has admitted to the Court with explanation.

RP at 174.

Finally, during closing remarks, Marshall objected to the State's use of hearsay. But when the State offered to make arrangements for the witnesses in question to testify, Marshall declined the offer.

Because Macy's and Stajduhar's testimony was demonstrably reliable, the trial court did not err when it considered it.

3. Polygraph results

Marshall argues that Washington law has long held that polygraph results are inadmissible at trial unless (1) the parties stipulate in advance to the result's admissibility; and (2) the court determines that the examiner is qualified and the conditions of the test were appropriate. He argues that none of these conditions were met and, therefore, the court erred when it admitted the polygraph test results.[5]

[5] Further, he argues that the polygraph results were hearsay and, under *Crawford*, the court denied him his right of confrontation. This argument does not have merit because *Crawford* does not apply to SSOSA hearings. *State v. Abd-Rahmaan*, 154 Wn.2d 280, 289-90, 111 P.3d 1157 (2005) (quoting *State v. Dahl*, 139 Wn.2d 678, 686, 990 P.2d 396 (1999)).

A "[d]efendant's failure to object to a violation of due process and his own use of hearsay during argument constitute[s] a waiver of any right of confrontation and cross examination." *Dahl*, 139 Wn.2d at 687 n.2 (quoting *Nelson*, 103 Wn.2d at 766).

Marshall did not object to the admission of the polygraph results at the hearing and he answered questions about those results on both direct and cross-examination. Thus, under *Dahl*, Marshall waived this argument on appeal. Further, he opened the door when he stated that he passed the polygraph test, except for one question indicating deception. The State was then allowed to introduce the actual results, which showed that Marshall failed the polygraph test and that he was deceptive in his response to four questions.

C. Standard of Review Applied at Trial

Marshall argues that the trial court did not apply the more stringent standard of review set out in *State v. Dupard*, which requires the court to find by a preponderance of the evidence that Marshal violated the terms of his SSOSA. 93 Wn.2d 268, 609 P.2d 961 (1980) (parole revocation hearings require the court to find a violation by a preponderance of the evidence). He contends that the court used the standard set forth in *State v. Kuhn*, requiring only that the court be reasonably satisfied that a breach occurred. 81 Wn.2d 648, 650, 503 P.2d 1061 (1972). And he argues that neither standard was met because the evidence was unreliable.

Marshall ignores the clear precedent that establishes the appropriate standard of review as requiring the State to "reasonably satisfy the court" that an offender has violated a condition of the sentence. *See, e.g., Canfield*, 120 Wn. App. at 732. Although *Dahl* grants the same *due process* rights as those afforded at a parole revocation hearing, it did not change the standard of

review at such a hearing. 139 Wn.2d at 683 ("[O]ffenders who face SSOSA revocation are entitled the same minimal due process rights as those afforded during the revocation of probation or parole.") In fact, *Dahl* states: "An offender's SSOSA may be revoked at any time if a court is *reasonably satisfied* that an offender has violated a condition of his suspended sentence or failed to make satisfactory progress in treatment." 139 Wn.2d at 683 (emphasis added). Thus the appropriate standard of review is the "reasonably satisfied" standard.

Here, it appears that the court applied a clear, cogent, and convincing standard. In its oral decision, the court stated:

> In trying to weigh that testimony, I have basically come to this conclusion, that all of the violations alleged here have in fact occurred, and the polygraph alone tells me that. But, I believe Mr. Marshall has consistently tried to push the envelope here, so to speak. He clearly knew what the rules were, and he *clearly* violated them. I think you couple that with Mr. Macy's testimony, and I don't see any way I can say, well, I'm going to give him another chance.

RP at 197 (emphasis added). The court went on to say:

> SSOSA is in fact a privilege and the rules are clear up front. . . His relationship with Ms. Craig was *clearly* one that had to be reported, and I think he knew it. And the contacts with [T.D.] were *clearly* such that they needed to be reported, not just once in an initial report, but consistently.

RP at 197-98 (emphasis added).

Thus, we find that the trial court's use of the more stringent standard favored Marshall and we find no prejudicial error.

D. Sufficient Evidence

Marshall argues that the evidence did not support the court's finding that he violated the terms of his SSOSA.

The State alleged that Marshall violated the SSOSA because he had been terminated from Macy's treatment program, had contact with a minor, failed to report a romantic relationship, and failed to take a required polygraph examination. Marshall admitted to at least three of these violations (contact with a minor, termination from Macy's program, and refusal to take the polygraph). His admissions alone were sufficient to support a finding that he had violated his SSOSA. Furthermore, the court heard testimony from Marshall's CCO and Macy about Marshall's violations and that he failed his polygraph examination, which indicated that he was deceptive about having contact with a minor. Thus, the evidence was sufficient to support the trial court's decision to revoke Marshall's SSOSA.

E. Ineffective Assistance of Counsel

Marshall argues that he received ineffective assistance of counsel because his attorney failed to object to the admission of the polygraph results.

To show ineffective assistance of counsel, an appellant must show that (1) counsel's performance was deficient; and (2) the deficient performance prejudiced him. *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997). Prejudice occurs when, but for counsel's deficient performance, the outcome would have differed. *In re Personal Restraint of Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1998).

We give great deference to counsel's performance and the analysis begins with a strong presumption that counsel was effective. *Strickland v. Washington*, 466 U.S. 668, 689-90, 104 S.

Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. McFarland*, 127 Wn.2d 332, 335, 899 P.2d 1251 (1995). This presumption can be overcome where, for example, the attorney failed to properly investigate, determine appropriate defenses, or properly prepare for trial. *State v. Byrd*, 30 Wn. App. 794, 799, 638 P.2d 601 (1981) (quoting *State v. Jury*, 19 Wn. App. 256, 263, 576 P.2d 1302 (1978)).

Marshall's counsel told the court that he would not object to the admission of the polygraph, stating: "I think the polygraph report is admissible by statute. It is required by Mr. Marshall and I certainly have no objection." RP at 168. Marshall argues on appeal that his attorney was incorrect (deficient performance) and that the polygraph was not admissible under *State v. Renfro*, 96 Wn.2d 902, 906-07, 639 P.2d 737 (1982) (polygraph results are admissible only if the parties stipulate to the admission and they are reliable enough to be relevant).

While counsel was incorrect and no statute compelled the admission of the polygraph results, they were nonetheless admissible. *Renfro* establishes standards for the admission of polygraph results at trial. 96 Wn.2d at 906-07. But SSOSA revocation hearings are not trials and the rules of evidence do not apply. *State v. Anderson*, 88 Wn. App. 541, 544, 945 P.2d 1147 (1997) (the rules of evidence do not apply to probation revocation hearings); *Badger*, 64 Wn. App. at 907-08 (a SSOSA revocation hearing is analogous to a probation revocation hearing and an offender under SSOSA has minimal due process rights at a revocation hearing).[6]

Here, had Marshall objected to the polygraph's admission, the court likely would have

[6] We further note that polygraph examinations are monitoring tools that the trial court may require in order to ensure an offender's compliance with the terms of his SSOSA. *See State v. Eaton*, 82 Wn. App. 723, 733-34, 919 P.2d 116 (1996). It is, therefore, reasonable to allow the trial court to then review those results in deciding whether to revoke a SSOSA.

admitted it because (1) Marshall opened the door by answering questions about the polygraph; (2) Marshall lied about the polygraph results; and (3) the State impeached Marshall with the actual results. Furthermore, the evidence was uncontradicted that Marshall had violated the

terms of his SSOSA by (1) having contact with a 15-year-old female; (2) engaging in a sexual relationship without reporting it; (3) having contact with young children and failing to report it; (4) being terminated from treatment; and (5) refusing to take a required polygraph examination. Under these circumstances Marshall fails to establish that he was prejudiced by his counsel's failure to object to the polygraph's admission and he cannot establish ineffective assistance of counsel.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Van Deren, J.

We concur:

Hunt, J.

Quinn-Brintnall, C.J.